No. 18-15386

IN THE

United States Court of Appeals for the Ninth Circuit

RAEF LAWSON, individually and on behalf of other similarly situated individuals, and in his capacity as Private Attorney General Representative,

Plaintiff-Appellant,

v.

GRUBHUB HOLDINGS INC. and GRUBHUB INC.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
Case No. 15-cv-05128 JSC

PLAINTIFF-APPELLANT'S OPENING BRIEF

Shannon Liss-Riordan
Thomas Fowler
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, Massachusetts 02116
(617) 994-5800
sliss@llrlaw.com; tfowler@llrlaw.com

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 5

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. THE APPLICATION OF THE "ABC" TEST ADOPTED BY THE CALIFORNIA SUPREME COURT IN *DYNAMEX* REQUIRES THE REVERSAL OF THE DISTRICT COURT'S CONCLUSION THAT PLAINTIFF WAS AN INDEPENDENT CONTRACTOR RATHER THAN GRUBHUB'S EMPLOYEE 9

A. Because Plaintiff Performed Work Within GrubHub's Regular Course of Business (Food Delivery), GrubHub Cannot Satisfy Prong B of the ABC Test 10

B. Because Plaintiff was not Engaged in His Own Independently Established Trade, Occupation, or Business, GrubHub Also Cannot Satisfy Prong C of the ABC Test 16

C. GrubHub Also Cannot Satisfy Prong A of the ABC Test, Because it Retained the Right to Control (and Did in Fact Control) Plaintiff's Work 20

II. *DYNAMEX* APPLIES TO THIS CASE 25

A. *Dynamex* Applies to This Case Retroactively 25

B. *Dynamex* is Applicable to Plaintiff's Expense Reimbursement Claim as Well as His Minimum Wage and Overtime Claims 28

III. IF THIS COURT BELIEVES IT NEEDS TO ADDRESS IT, THE DISTRICT COURT ERRED IN HOLDING PLAINTIFF TO BE AN INDEPENDENT CONTRACTOR EVEN UNDER THE *BORELLO* COMMON LAW TEST 30

A. GrubHub Retained All Necessary Control Over Plaintiff's Work 31

i. GrubHub Retained the Right to Terminate Its Drivers, Including Plaintiff, Without Cause 31

ii. GrubHub Controlled Its Drivers' Work, Including Plaintiff's, in Numerous Other Ways as Well 35

B. The Secondary *Borello* Factors Also Support a Conclusion that Plaintiff was GrubHub's Employee 40

IV. THE DISTRICT COURT ERRED BY GRANTING GRUBHUB'S PREMATURE MOTION TO DENY CLASS CERTIFICATION 45

A. The District Court Should Have Permitted Plaintiff to Move for Class Certification, and if a Class Were Certified, it Could Have Then Considered GrubHub's Motion to Compel Class Members' Claims to Arbitration 46

B. Because Plaintiff Was Not Bound by an Arbitration Agreement, He Should Have Been Free to Attempt to Represent a Class of GrubHub Drivers in Court, Regardless of Whether They Would Have Been Bound by Arbitration Had They Brought Their Own Claims 48

CONCLUSION 52

TABLE OF AUTHORITIES

Cases

Aguilera v. Prospect Mortgage, LLC
2013 WL 4779179 (C.D. Cal. Sept. 5, 2013) 47

Alexander v. FedEx Ground Package System, Inc.
765 F.3d 981 (9th Cir. 2014) ..... passim

Amero v. Townsend Oil
2008 WL 5609064 (Mass. Super. Ct. Dec. 3, 2008) 12

Amey v. Cinemark USA, Inc.
2014 WL 4417717 (N.D. Cal. Sept. 5, 2014).....45

Andrade v. P.F. Chang's China Bistro, Inc.
2013 WL 5472589 (S.D. Cal. Aug. 9, 2013).....49

Antelope Valley Press v. Poizner
162 Cal. App. 4th 839 (2008) 42

Awuah et al v. Coverall North America
707 F. Supp. 2d 80 (D. Mass. 2010)..... 12, 14

Ayala v. Antelope Valley Newspapers, Inc.
59 Cal. 4th 522 (2014)..... 30, 32, 43

Barbosa et al. v. Kilnapp Enterprises, Inc. d/b/a/ Real Clean
Norfolk C.A. No. 2013-00266-A (Mass. Super. Ct. June 13, 2014).....11

Barr v. ADandS, Inc.
57 Cal. App. 4th 1038 (1997) 26

Bond v. Fleet Bank (RI), N.A.
2002 WL 31500393 (D.R.I. Oct. 10, 2002).....45

Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Employment & Training
56 Mass. App. Ct. 473 (2002).....18

Bzdawka v. Milkwaukee Cty.
238 F.R.D. 468 (D. Wis. 2006).....47

Carey v. GateHouse Media, Inc.
92 Mass. App. Ct. 801 (2018)..... 11, 13, 14, 15

Chaves v. King Arthur's Lounge
2009 WL 3188948 (Mass. Super. July 30, 2009).....12

Coleman v. Gen. Motors Acceptance Corp.
220 F.R.D. 64 (M.D. Tenn. 2004) 44

Coleman v. Jenny Craig, Inc.
2013 WL 6500457 (S.D. Cal. Nov. 27, 2013), *aff'd*, 2016 WL 1583627 (9th Cir. Apr. 20, 2016) 48

Collins v. Int'l Dairy Queen, Inc.
168 F.R.D. 668 (M.D. Ga. 1996).....45

Conde v. Open Door Marketing, LLC
223 F.Supp.3d 949 (N.D. Cal. 2017).....44

Coverall North America, Inc. v. Com'r of Div. of Unemployment Assistance
447 Mass. 852 (2006) 18

D'Antuono v. C & G of Groton, Inc.
2011 WL 5878045 (D. Conn. Nov. 23, 2011).....45

Davis v. Four Seasons Hotel Ltd.
2011 WL 4590393 (D. Haw. Sept. 30, 2011).....44

Davis v. Novastar Mortg., Inc.
408 F. Supp. 2d 811 (W.D. Mo. 2005).....45

De Giovanni v. Jani-King International, Inc.
U.S. Dist. Ct. C.A. No. 07-10066-MLW (D. Mass. June 6, 2012) 11

Deatrick v. Securitas Security Services USA, Inc.
2014 WL 5358723 (N.D. Cal. Oct. 20, 2014) 45

Dynamex Operations West, Inc. v. Superior Court
4 Cal. 5th 903 (2018) ..... passim

E.E.O.C. v. Waffle House
534 U.S. 279 (2002).....48

Estrada v. FedEx Ground Package Sys., Inc.
154 Cal. App. 4th 1 (2007) ..... passim

Evangelatos v. Superior Court
(1988) 44 Cal. 3d 1188 25

Fleece on Earth v. Dep't of Emple. & Training
923 A.2d 594 (Vt. 2007).....21

Flores v. Velocity Express, LLC
250 F. Supp. 3d 468 (N.D. Cal. 2017).....41

Fucci v. Eastern Connection Operating, Inc.
C.A. No. 2008-2659 (Mass. Super. Sept. 21, 2009).....12

Garcia v. Border Transportation Group, LLC et al.
2018 WL 5118546 (Oct. 22, 2019)..... 25, 28

Granite State Ins. Co. v. Truck Courier, Inc.
2014 WL 316670 (Middlesex Super. Ct. Jan. 17, 2014).....11

Guzman v. Bridgepoint Educ., Inc.
305 F.R.D. 594 (S.D. Cal. 2015) 48

In re DirecTV Early Cancellation Litig.
738 F. Supp. 2d 1062 (C.D. Cal. 2010) 46

In re Evanston Nw. Corp. Antitrust Litig.
2013 WL 6490152 (N.D. Ill. Dec. 10, 2013).....44

In re Titanium Dioxide Antitrust Litig.
962 F. Supp. 2d 840 (D. Md. 2013).....49

In re Worlds of Wonder Securities Litigation
1992 WL 330411 (N.D. Cal. July 9, 1992) 47

Jenks v. D & B Corp., d/b/a/ The Golden Banana
28 Mass. L. Rptr. 579 (Mass. Super. Ct. Aug. 24, 2011 12

JKH Enterprises, Inc. v. Department of Industrial Relations
142 Cal. App. 4th 1046 (2006) 37, 38

Johnmohammadi v. Bloomingdale's, Inc.
755 F.3d 1072 (9th Circ. 2014).....46

Johnson v. Morton's Restaurant Group, Inc., et al.
Case No. 07-11808-MLW (D. Mass. Nov. 25, 2008) 49

Johnson v. VCG-IS, LLC
Case No. 30-2015-00802813 (Super. Ct. Cal. Sept. 5, 2018) 16, 25, 28

Kick v. Alibab.com, Inc.
2018 WL 4181955 (N.D. Cla. Aug. 30, 2018) 45

Knecht v. City of Redwood City
683 F. Supp. 1307 (N.D. Cal. 1987).....35

Linton v. Desoto Cab Company, Inc.
15 Cal. App. 5th 1208 (Cal. App. Ct. Oct. 5, 2017) 30, 32, 33

Machado et al. v. System4 LLC et al.
Norfolk C.A. No. 10-00555 (Mass. Super. Apr. 11, 2012) 11

Martins v. 3PD, Inc.
2013 WL 1320454 (D. Mass. Mar. 28, 2013) 11

Meier v. Mastec North America, Inc.
Hampden C.A. No. 13-00488 (Mass. Super. April 8, 2015).....11

Monteiro v. PJD Entertainment of Worcester, Inc., d/b/a/ Centerfolds
29 Mass. L. Rptr. 202 (Mass. Super. Ct. Nov. 23, 2011).....12

Narayan v. EGL, Inc.
616 F.3d 895 (9th Cir. 2010) 21

Neale v. Volvo Cars of N. Am., LLC
794 F.3d 353 (3d Cir. 2015) 47

Newman v. Emerson Radio Corp.
48 Cal. 3d 973 (1989) 25

O'Connor v. Uber Technologies, Inc.
82 F. Supp. 3d 1133 (N.D. Cal. 2015).....29

Oliveira v. Advanced Delivery Sys., Inc.
2010 WL 4071360 (Mass. Super. Jul. 16, 2010) 12

On the House Syndication, Inc. v. Fed. Exp. Corp.
203 F.R.D. 452 (S.D. Cal. 2001) 47

People v. Guerra
37 Cal. 3d 385 (1984) 25

Phillips Petroleum Co. v. Shutts
472 U.S. 797 (1985) 46

Ramirez v. Freescore, LLC
2011 WL 3812608 (C.D. Cal. Aug. 30, 2011) 49

Ruiz v. Affinity Logistics Corp.
754 F.3d 1093 (9th Cir. 2014) 38

S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations
48 Cal. 3d 341 (1989) ..... passim

Sakacsi v. Quicksilver Delivery System, Inc.
2007 WL 4218984 (M.D. Fla. Nov. 28, 2007) 41

Sali v. Corona Reg'l Med. Ctr.
889 F.3d 623 (9th Cir. 2018) 5

Saltarelli v. Bob Baker Group Medical Trust
35 F.3d 382 (9th Cir. 1994) 5

Sealy v. Keiser Sch., Inc.
2011 WL 7641238 (S.D. Fla. Nov. 8, 2011) 45

Sierra Club v. San Joaquin Local Agency Formation Com.
(1999) 21 Cal. 4th 489 25

United States v. Security Industrial Bank
459 U.S. 70 (1982) 25

United States v. Tavizon-Ruiz
196 F. Supp. 3d 1076 (N.D. Cal. July 25, 2016) 25

United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co.
602 F.3d 1087 (9th Cir. 2010) 1

Villatoro v. Kim Son Restaurant, L.P.
286 F.Supp.2d 807 (S.D. Tex. 2003) 45

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University
489 U.S. (1989) 49

Whittington v. Taco Bell of America, Inc.
2011 WL 1772401 (D. Col. May 10, 2011) 45

Woods v. Club Cabaret, Inc.
140 F. Supp. 3d 775 (C.D. Ill. 2015) 45

Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.
226 Cal. App. 3d 1288 (Cal. Ct. App. 1991) 33

Statutes

Cal. Code Regs., tit. 8, §11050 28

Cal. Lab. Code § 1194 .....3, 4

Cal. Lab. Code § 1197 3

Cal. Lab. Code § 1198 4

Cal. Lab. Code § 2698 *et seq.* 3

Cal. Lab. Code § 2802 ..... 4, 7, 27

Cal. Lab. Code § 510 4

Cal. Lab. Code § 554 4

Cal. Labor Code § 2802 28

28 U.S.C. § 1332(d)(2).....1

Rules

Fed. R. Civ. P. 23 ..... 8, 44, 45, 47

JURISDICTIONAL STATEMENT

This is an appeal from a judgment following a bench trial, as well as from an order denying class certification; this Court has jurisdiction pursuant to 28 U.S.C. §1291. The District Court had jurisdiction pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2), as the matter in controversy exceeded $5,000,000, exclusive of interest and costs, and at least one member of the proposed class in the case was a citizen of a state different from that of at least one defendant. The District Court's subsequent denial of class action status did not divest it of subject matter jurisdiction. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010). The District Court's final order entering judgment for Defendants was entered on February 8, 2018. Plaintiff-Appellant appealed on March 7, 2018, making this appeal timely pursuant to 28 U.S.C. § 2107(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether this Court should reverse the District Court's decision concluding that Plaintiff was an independent contractor rather than employee of GrubHub under the ABC misclassification test recently adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018);

If the Court finds it needs to address the issue, whether the District Court also erred in finding that Plaintiff was an independent contractor rather than an employee under the common law test set forth in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989);

Whether the District Court erred by granting GrubHub's motion to deny class certification in this case (before Plaintiff had even submitted a motion seeking class certification).

STATEMENT OF THE CASE

Defendant-Appellees GrubHub, Inc. and GrubHub Holdings, Inc. (hereinafter collectively referred to as "GrubHub") operate a food delivery service that employs many thousands of delivery drivers around the country, including in California, but classifies them as independent contractors. Excerpts of Record ("ER") 1150, 1395. GrubHub dispatches delivery drivers throughout the country via an on demand dispatch system. ER0837-839, 1394, 1701. By misclassifying its drivers as independent contractors, GrubHub has been able to reap substantial savings in labor costs by avoiding compliance with the California Labor Code, including ensuring drivers receive minimum wage and overtime and reimbursing drivers for the cost of using and maintaining their vehicles for its delivery service. ER0291-294. Plaintiff-Appellant Raef Lawson worked as a GrubHub delivery driver from October 2015 to February 2016, delivering food to GrubHub's customers in Los Angeles, California. ER1708.

Plaintiff brought class action claims under the California Labor Code and a representative action under the Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.*, alleging that GrubHub misclassified him and other delivery drivers across California as independent contractors and thereby violated the Labor Code by failing to pay minimum wage (Cal. Lab. Code §§ 1197 and 1194), failing to pay a time-and-a-half overtime premium for hours worked in excess of forty per

week or eight per day (Cal. Lab. Code §§ 1194, 1198, 510, and 554), and failing to reimburse for necessary business expenses (Cal. Lab. Code § 2802). ER1885-1895.

At the outset of the case, and before Plaintiff had even requested that a class be certified, GrubHub submitted a premature motion to deny class certification, which the District Court granted on July 13, 2016. ER0035-44. Plaintiff then proceeded with his representative PAGA claim.

Following discovery, GrubHub moved for summary judgment, which the District Court denied on July 10, 2017. ER1789-1805.

Prior to trial, the parties stipulated to bifurcate the case by focusing first on whether Plaintiff was misclassified (and thus was an "aggrieved employee" under PAGA) and deferring the question of what PAGA penalties may be owed on account of GrubHub's alleged misclassification of drivers across California. ER1806-1809.

The District Court presided over a bench trial on Plaintiff's claims that lasted from September 5-12, 2017. ER1897-1912. The District Court issued its decision on February 8, 2018, determining that Plaintiff was properly classified as an independent contractor. ER0002-34. Plaintiff submitted a timely notice of appeal on March 7, 2018. ER0233-236.

On April 30, 2018, the California Supreme Court issued its decision in *Dynamex Operations, West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), in which

the Court adopted an "ABC" test for misclassification, which supplanted the common law test that the District Court had applied under *Borello*. While Plaintiff contends that the District Court erred in its application of the *Borello* test, there could really be no question that Plaintiff was an employee under the *Dynamex* ABC test.

STANDARD OF REVIEW

The District Court's conclusions of law are reviewed *de novo*. *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 385 (9th Cir. 1994). The District Court's factual findings are reviewed for clear error. *Id.* at 384. The District Court's class certification determination is reviewed *de novo* for legal error, and if no legal error occurred, the determination is reviewed for abuse of discretion. *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 629 (9th Cir. 2018).

SUMMARY OF ARGUMENT

This case challenges the classification of food delivery drivers by GrubHub as independent contractors under California law. In light of the California Supreme Court's recent decision in *Dynamex*, the District Court's decision that Plaintiff was an independent contractor rather than GrubHub's employee must be reversed. In *Dynamex*, the California Supreme Court announced a revised and extremely stringent "ABC" test for determining when workers may be classified as

independent contractors and when they must be classified as employees for purposes of claims brought under the California Labor Code to enforce rights under the California Wage Orders. In determining that Plaintiff was properly classified as an independent contractor and thus entering judgment on behalf GrubHub, the District Court below applied the California common law test for determining employee status that had been previously enunciated in *Borello*. ER0002-34. However, under the newly announced "ABC" test, which the Supreme Court in *Dynamex* expressly borrowed from Massachusetts law, *see Dynamex*, 4 Cal. 5th at 956 n.23, the alleged employer must demonstrate that: "(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed." *Id.* The ABC test is conjunctive, meaning that if the alleged employer cannot establish *all three factors* with regard to a worker, that worker is an employee as a matter of law. *See id.* at 957.

Here, the District Court held – both on summary judgment and again after trial - that GrubHub is a food delivery business. Thus, GrubHub cannot satisfy Prong B of the ABC test, as it cannot establish that Plaintiff, who worked as a food

delivery driver, performed work outside GrubHub's usual course of business. Thus, judgment must be entered in Plaintiff's favor that he was an employee based on this conclusion alone. *See infra* Part I.A.

Because GrubHub cannot satisfy Prong B, there is no need for the Court to even consider Prongs A and C of the ABC test. However, GrubHub likewise cannot satisfy those prongs either. *See infra* Parts I.B and I.C. With respect to Prong C, the District Court itself found that Plaintiff did not operate his own independently established business, ER0027. GrubHub also cannot satisfy Prong A, because GrubHub retained control over Plaintiff's work under the contract (including the right to terminate him in its discretion that he was not performing satisfactorily) and in fact exercised that control in myriad ways for Plaintiff, like all of its drivers.

GrubHub may argue that *Dynamex* does not apply to this case because the decision was issued after the trial here. However, the law is clear that decisions of the California Supreme Court apply retroactively, including in particular cases still pending on appeal. *See infra* Part II.A.

Likewise, GrubHub may argue that, while *Dynamex* would apply to Plaintiff's claims for minimum wage and overtime pay, it does not apply to Plaintiff's claim for expense reimbursement under Cal. Lab. Code § 2802. However, under *Dynamex*, the ABC test applies to claims covered by the Wage

Orders, and Plaintiff's claim for reimbursement for the use of his vehicle clearly falls under Wage Order No. 9. *See infra* Part II.B.

Because the *Dynamex* ABC test applies to the claims in this case, the Court need not even address whether the District Court erred in its conclusion that Plaintiff was properly classified as an independent contractor under the *Borello* common law test that previously applied. However, if the Court does choose to address this test, it should hold that the District Court erred in its application of *Borello* and recognize that Plaintiff was an employee even under this test. *See infra* Part III.

Finally, Plaintiff submits that the District Court erred by granting GrubHub's premature motion to deny class certification -- before Plaintiff had even moved for certification. The District Court accepted GrubHub's argument that Plaintiff could not represent a class because he (unlike practically all other GrubHub drivers) opted out of GrubHub's arbitration agreement. ER0035-44. However, the proper course in such a situation would have been for the Court to consider – upon Plaintiff's motion under Fed. R. Civ. P. 23 – whether class certification was warranted under that standard, and if it was, then allow the defendant to move to compel the class members to arbitration. Had the Court followed that procedure, Plaintiff would have later argued that, because he was not bound by an arbitration clause, he was free to bring a class claim on behalf of other GrubHub drivers in

California (regardless of whether they themselves opted out of arbitration). *See infra* Part IV.

ARGUMENT

I. THE APPLICATION OF THE "ABC" TEST ADOPTED BY THE CALIFORNIA SUPREME COURT IN *DYNAMEX* REQUIRES THE REVERSAL OF THE DISTRICT COURT'S CONCLUSION THAT PLAINTIFF WAS AN INDEPENDENT CONTRACTOR RATHER THAN GRUBHUB'S EMPLOYEE

Following a bench trial, the District Court issued its decision in February 2018 holding that GrubHub did not misclassify Plaintiff as an independent contractor. ER0002-34. In finding that Plaintiff was properly classified as an independent contractor, the District Court applied the *Borello* common law test. However, in April 2018, the California Supreme Court announced that, rather than the *Borello* test, a far stricter test, referred to as an "ABC" test, governs the question of whether workers like the Plaintiff have been misclassified. *See Dynamex*, 4 Cal. 5th at 956-57.

Under *Dynamex*, the worker is presumed to be an employee rather than an independent contractor unless the employer can meet its burden to show each of the three ABC factors. The ABC test is conjunctive, meaning that if the putative employer cannot establish *all three factors* with regard to a worker, that worker is an employee as a matter of law. *Id.* at 957. In other words, if the Court holds that an employer cannot satisfy any one of those factors, the inquiry ends and the

worker must be considered to be an employee. *Id.*at 966 (each prong of the ABC test "may be independently determinative of the employee or independent contractor question").

Here, the District Court's holding that Plaintiff worked within GrubHub's usual course of business, ER0027-28, means that GrubHub cannot satisfy Prong B of the test and the inquiry should end here, as Plaintiff was therefore GrubHub's employee. GrubHub also cannot satisfy Prongs A or C of the test.

A. Because Plaintiff Performed Work Within GrubHub's Regular Course of Business (Food Delivery), GrubHub Cannot Satisfy Prong B of the ABC Test

Significantly, the *Dynamex* Court specifically adopted the Massachusetts version of the "ABC" test for employment classification, which contains a very strict "B" prong. *See id.* at 956 n.23. That test has been widely recognized as one of the strictest, if not the strictest, tests in the country for employee status. Under the B prong of that test, an alleged employer can only establish independent contractor status by proving that the work performed is outside the employer's usual course of business. In other words, as the Supreme Court explained in *Dynamex*:

> [W]hen a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company . . . or when a bakery hires cake decorators to work on its custom-designed cakes . . . the workers are part of

> the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.

Id. at 959 (internal citations omitted).

Here, as the District Court held, Plaintiff -- a delivery driver for GrubHub -- did not work outside GrubHub's usual course of business. ER0029-30. Therefore GrubHub cannot satisfy Prong B. Since GrubHub cannot satisfy Prong B, there is no need for the Court to even consider the other two prongs. *See Dynamex*, 4 Cal. 5th at 966 (noting that each prong of the ABC test is "independently determinative" and that court need not address a second prong, if the defendant cannot satisfy even one of the prongs).[1]

---

[1] Indeed, in Massachusetts, courts have routinely granted summary judgment to workers alleging misclassification under Prong B alone – since this question does not even raise factual issues (and even despite companies' repeated attempts to disclaim what their obvious usual course of business is). *See, e.g., Carey v. GateHouse Media, Inc.*, 92 Mass. App. Ct. 801 (2018) (affirming trial court's decision on summary judgment that newspaper delivery drivers were misclassified, based on Prong B of the ABC test); *Meier v. Mastec North America, Inc.*, Hampden C.A. No. 13-00488 (Mass. Super. April 8, 2015) (holding cable installers to be employees as a matter of law under ABC test) ER0129-141; *Granite State Ins. Co. v. Truck Courier, Inc.*, 2014 WL 316670, *4 (Middlesex Super. Ct. Jan. 17, 2014) (holding truck couriers to be employees as a matter of law under Prong B of the ABC test); *Barbosa et al. v. Kilnapp Enterprises, Inc. d/b/a Real Clean*, Norfolk C.A. No. 2013-00266-A, at *11-19 (Mass. Super. Ct. June 13, 2014) (granting summary judgment to auto detailers under Prong B of the ABC test) ER0109-128; *Martins v. 3PD, Inc.*, 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (holding delivery drivers to be employees of delivery company under ABC test);

In the context of analyzing one of the secondary factors under the *Borello* test – whether the work performed by Plaintiff was part of GrubHub's regular business – the District Court held on summary judgment that "GrubHub drivers are also central to the Grubhub business," and "Grubhub is a food ordering and delivery business." ER1797. Again, after trial, the Court reaffirmed this conclusion, explaining that GrubHub "is in the business of online restaurant ordering and . . . of also providing food delivery for certain restaurants" and that

---

De Giovanni v. Jani-King International, Inc., U.S. Dist. Ct. C.A. No. 07-10066-MLW (D. Mass. June 6, 2012) (holding "franchisee" cleaning workers to be employees as a matter of law under the ABC test of cleaning company that claimed to be franchise company rather than a cleaning company) ER0074-108; *Machado et al. v. System4 LLC et al.*, Norfolk C.A. No. 10-00555, at *4 (Mass. Super. Apr. 11, 2012) (holding "franchisee" cleaning workers to have established likelihood of success on their claim that they had been misclassified under the ABC test) ER0065-73; *Monteiro v. PJD Entertainment of Worcester, Inc., d/b/a/ Centerfolds*, 29 Mass. L. Rptr. 202 (Mass. Super. Ct. Nov. 23, 2011) (holding exotic dancers to be employees of a strip club under ABC test); *Jenks v. D & B Corp., d/b/a/ The Golden Banana*, 28 Mass. L. Rptr. 579 (Mass. Super. Ct. Aug. 24, 2011) (same); *Chaves v. King Arthur's Lounge*, 2009 WL 3188948, *1 (Mass. Super. July 30, 2009) (same); *Awuah et al v. Coverall North America*, 707 F. Supp. 2d 80 (D. Mass. 2010) (granting summary judgment to cleaning "franchisees" on misclassification claims under Prong B of the ABC test); *Oliveira v. Advanced Delivery Sys., Inc.*, 2010 WL 4071360 (Mass. Super. Jul. 16, 2010) (holding delivery drivers to be employees of delivery company under the ABC test); *Fucci v. Eastern Connection Operating, Inc.*, C.A. No. 2008-2659, at *9 (Mass. Super. Sept. 21, 2009) (holding delivery drivers to be employees as a matter of law under the ABC test) ER0052-64; *Amero v. Townsend Oil*, 2008 WL 5609064 (Mass. Super. Ct. Dec. 3, 2008) (same).

"at the time [Plaintiff] drove for Grubhub food delivery was part of Grubhub's regular business . . . ." ER0030. The District Court specifically noted that "Grubhub deliberately entered the food delivery business in certain urban markets" and "developed an entire mobile app and algorithm and created entire company departments to facilitate Grubhub's delivery services." ER0030.[2]

The District Court rejected GrubHub's argument that it is not really a food delivery business because its primary business is being a platform for food ordering; the District Court recognized that, even if it is also a platform for food ordering, it is also in the business of food delivery (and that is an important and growing part of its business). ER0030, 0542, 0569-571, 1143-1146, 1202-1207, 1211-1219, 1395-1397,1413-1416, 1478-1479. Indeed, under the ABC test adopted in *Dynamex*, an employer is not limited to having just one usual course of

---

[2] The District Court further noted that GrubHub "is in the business of online restaurant ordering, and in the Los Angeles market, of also providing food delivery for certain restaurants." ER0030. GrubHub's Chief Operating Officer Stan Chia testified that without its delivery business, GrubHub would not be viable in major cities, and he emphasized repeatedly the powerful impact that GrubHub's delivery service has made on its market share across the country. ER1206-1207. As of June 2016, there were 4,000 active GrubHub delivery drivers in California alone. ER1143-1219. While for many years, GrubHub provided a way for customers to order food online from restaurants without providing a delivery component, the evidence showed that since GrubHub established its delivery service in 2014, it has grown its delivery service extremely significantly. ER1143-1146, 1202-1219, 1395-1397, 1413-1416, 1478-1479. GrubHub's SEC filings also acknowledge the significant role that delivery plays in its business. ER0542, 0569-571.

business. *See Carey*, 92 Mass. App. Ct. at 808 (recognizing that "a service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business.")

Notably in *Dynamex*, the California Supreme Court also approvingly cited a Massachusetts case in which the court looked past what business the alleged employer claimed to be and determined – as a matter of law on summary judgment – what business it was actually in. In *Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80, 82 (D. Mass. 2010) (cited in *Dynamex*, 4 Cal. 5th at 963), the court granted summary judgment to the plaintiff, agreeing that he (a cleaning worker) performed services within the defendant's usual course of business, which the court concluded was commercial cleaning -- despite the defendant's efforts to deny that it was itself in the cleaning business and to characterize itself merely as a "franchisor" that sold franchises to independent cleaning businesses.

Courts in Massachusetts have regularly rejected defendants' arguments that that they are not actually in the business they are clearly are in, based upon their creative labeling of their business. Instead, Massachusetts courts applying this test (that has now been adopted in California) have recognized that it is up to the courts to determine what the defendant's actual usual course of business is. In *Carey*, 92 Mass. App. Ct. at 805-11, the Massachusetts Appeals Court noted that "the manner

in which a business defines itself is relevant to determining its usual course of business," *Id.* at 805, but "[o]f course, this approach must have its limits. A business cannot alter the substance of its usual course of business merely by careful (or careless) self-labeling in its dealings with contractors, employees, customers or the public," *Id.* at 806 n.9.

While GrubHub argued at trial that its principal business was facilitating food orders rather than food delivery, it is clear that food delivery need not be GrubHub's "sole, principal or core" business in order to comprise a part of its usual course of business for purposes of Prong B. *Id.* Indeed, in *Carey*, the Massachusetts Appeals Court explained that:

> GateHouse deals directly with potential customers in selling subscriptions that include the drivers' delivery services; GateHouse assigns subscribers to delivery territories, deals directly with subscribers in accepting payments, specific delivery instructions, and delivery complaints and conveys those instructions and complaints to the drivers; and GateHouse maintains contractual disincentives to poor delivery service, as well as contractual incentives for expanding delivery service to new customers.

Id. at 810. The same is true here where GrubHub interacts directly with its customers, assigns deliveries to drivers through its app, accepts and processes payments, fields customer complaints, and incentivizes good service by drivers through use of its acceptance and cancellation rates and other metrics, which it uses to punish drivers. ER0004-18. Therefore, like in *Carey*, GrubHub "is not

merely a wholesaler that takes little interest in whether and how its drivers succeed" in making deliveries; GrubHub is "directly dependent on the success of the drivers' endeavors." *Carey*, 92 Mass. App. Ct. at 810. Indeed, as the District Court noted, "offering delivery services is key to GrubHub's continued growth in urban markets such as Los Angeles." ER0030.

Indeed, the first court in California to apply *Dynamex* followed Massachusetts caselaw in holding that an exotic dancer was a strip club's employee. *See Johnson v. VCG-IS, LLC*, Case No. 30-2015-00802813, Ntc. of Ruling on Motion for Summ. J. (Super. Ct. Cal. Sept. 5, 2018) ER0045-51. There, the court noted that the defendant "[h]olds itself out as a 'strip club' and the exotic dancers who perform there, including plaintiffs, are central to the defendant's business . . . ." *Id.* Similarly, delivery drivers such as Plaintiff perform delivery work for GrubHub, and under Prong B, GrubHub cannot avoid liability by attempting to define itself around its obvious course of business.

B. Because Plaintiff was not Engaged in His Own Independently Established Trade, Occupation, or Business, GrubHub Also Cannot Satisfy Prong C of the ABC Test

GrubHub also cannot satisfy the requirements of Prong C of the *Dynamex* ABC test. Under this prong, GrubHub must show that "that the worker is customarily engaged in an independently established trade, occupation, or business

of the same nature as the work performed." *Id.* at 956-57. In the context of examining the secondary *Borello* factor that asks whether Plaintiff was in a "distinct occupation or business," the District Court held that:

> Mr. Lawson was not engaged in a distinct occupation or business. He did not run a delivery business of which Grubhub was simply one client . . . . He did not get to decide how much Grubhub paid him or how much Grubhub's customers paid for his delivery services. Instead, Mr. Lawson worked multiple low-wage jobs in addition to his nascent acting career.

ER0027.[3] Thus, the District Court has already made ample findings that show that GrubHub cannot satisfy Prong C.[4]

In explaining Prong C, the Supreme Court in *Dynamex* stated that "[a]s a matter of common usage, the term 'independent contractor,' when applied to an

---

[3] The District Court properly rejected GrubHub's argument that Plaintiff had a distinct business given the fact that he identified himself on his tax return as self-employed, because "[g]iven that GrubHub and the other 'gig economy' companies for whom he performed services classified him as an independent contractor that is what he had to put on his return." ER0027.

[4] The District noted that "[h]e did not get to decide how much Grubhub paid him or how much Grubhub's customers paid for his delivery services," and "Instead, Mr. Lawson worked multiple low-wage jobs in addition to his nascent acting career." ER0027. The evidence at trial showed clearly that Plaintiff was not running "Raef's Delivery Service" catering to his own customers, negotiating his rates, and deciding which jobs to accept from which customers. ER1565-1583, 1700-1702. Instead, he was working a low-paying job, albeit with relatively flexible scheduling to support himself while pursuing his acting career. ER1583-1700. GrubHub, not Plaintiff, would decide how to handle issues with orders (either at the restaurant or with the customer). ER1583-1700.

individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself." *Dynamex*, 4 Cal. 5th at 962 (emphasis in original). Further, the Court noted that "[s]uch an individual generally takes the usual steps to establish and promote his or her independent business – for example, through incorporation, licensure advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers and the like." *Id.* None of those steps were taken by Plaintiff here.

Notably as well, in *Dynamex*, the Supreme Court cited to another Massachusetts case, *Coverall North America, Inc. v. Com'r of Div. of Unemployment Assistance*, 447 Mass. 852 (2006), which also illustrates the proper application of Prong C. There, the Court held that the alleged employer was the claimant's employer because it could not satisfy Prong C (of the nearly identical unemployment statute) because, when the claimant performed cleaning work for Coverall's customers, she was "wearing the hat of an employee of the employing company," rather than "the hat of her own independent enterprise." *Id.* at 859 (quoting *Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Employment & Training*, 56 Mass. App. Ct. 473, 480 (2002)). The Court concluded that she was not wearing her own hat, as "the claimant was required to allow Coverall to negotiate contracts and pricing directly with clients [and] bill

clients" – just as here, Plaintiff relied on GrubHub to provide the customers and deliveries, to bill customers, and was not able to negotiate terms and pricing directly with GrubHub's customers. ER0027.

Similarly, in another case in which the Massachusetts Appeals Court has applied Prong C, "[t]here was [] no evidence that [the courier in question] had his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing." *Boston Bicycle*, 56 Mass. App. Ct. at 482. As the District Court recognized, "Mr. Lawson worked multiple low-wage jobs in addition to his nascent acting career." ER0027. He did not do any of these things, which might have shown he operated his own independent delivery business.[5]

Here, the District Court's conclusion, which was solidly based on the record in this case, that Plaintiff did not independently engage in an independently established business indicates that GrubHub's business model is exactly what the Supreme Court in *Dynamex* had in mind when adopting the ABC test. GrubHub

---

[5] Indeed, under GrubHub's system, Plaintiff could not have advertised directly for customers to use his services (or even request him, rather than some other GrubHub driver). Clearly when he performed delivery services for GrubHub's customers, he was wearing the "hat" of GrubHub, not the "hat" of his own independent business.

unilaterally designates its drivers, including Plaintiff, as independent contractors. Plaintiff did not set out to go into business for himself. Thus, GrubHub cannot satisfy Prong C, and so Plaintiff is GrubHub's employee under *Dynamex*.

C. GrubHub Also Cannot Satisfy Prong A of the ABC Test, Because it Retained the Right to Control (and Did in Fact Control) Plaintiff's Work

Again, since GrubHub cannot satisfy Prongs B and C of the *Dynamex* ABC test, and either of those prongs is independently determinative, it is not necessary for the Court even to address Prong A. However, were this Court to consider Prong A, it provides further support for this Court's reversal of the District Court's decision.

While the District Court did not find that the degree to which GrubHub retained the right to control the details of Plaintiff's work supported employee status under the *Borello* test, the court's actual findings nevertheless should lead to the legal conclusion that GrubHub cannot satisfy Prong A. This prong considers "whether the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact." *Dynamex*, 4 Cal. 5th at 956-57. The District Court rested its conclusion regarding right of control on this analysis:

> Of primary significance, Grubhub did not control the manner or means of [Plaintiff's] work, including whether he worked at all or for how long or

> how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to deliver for Grubhub.

ER0031.

However, in construing prong A, the *Dynamex* Court favorably cited a case in which the Vermont Supreme Court (using a similar iteration of the ABC Test) held that a clothing company retained the right to control the work of its knitters and sewers even though they "worked at home on their own machines at their own pace and on the days and at the times of their own choosing," because "'[t]o reduce part A of the ABC test to a matter of what time of day and in whose chair the knitter sits when the product is produced ignores the protective purpose of the [applicable] law.'" *Dynamex*, 4 Cal. 5th at 958 n.27 (quoting *Fleece on Earth v. Dep't of Emple. & Training*, 923 A.2d 594, 599-600 (Vt. 2007)). Indeed, the *Dynamex* Court also specifically noted when discussing Prong A that the "suffer or permit" test from which the ABC test was derived was "intended to be broader and more inclusive than the common law test." *Dynamex*, 4 Cal. 5th at 953. GrubHub's right to terminate at will, which under California law is the most important factor in determining the employer's right to control, *see Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010), should lead to the conclusion under *Dynamex* that GrubHub also cannot satisfy Prong A. The fact that Plaintiff had some control

over when he worked is not the significant detractor from GrubHub's right to control that the District Court characterized it to be.

Instead, as described above, GrubHub retained the right to terminate its drivers in its discretion, and indeed it exercised that right in terminating Plaintiff. It also exercised control over its drivers in myriad other ways.

Without question, GrubHub retains the right to terminate its delivery drivers without cause and in its own discretion, and indeed it frequently exercised that right. ER0781. If a driver fails to perform or fulfill GrubHub's requirements to the company's satisfaction, or engages in behavior that GrubHub decides is not appropriate, GrubHub may unilaterally, in its discretion, terminate the driver. ER0695-697, 0703-704, 1466, 1725. Indeed, GrubHub terminated Plaintiff with nothing but a vague explanation and without providing him any opportunity to respond. ER0695-697, 0703-704, 1466, 1725.[6]

---

[6] At trial, GrubHub focused intently on the alleged reasons for Plaintiff's termination, essentially attempting to turn the case into a trial on wrongful termination (which is not what the trial was about). The District Court appeared swayed by accusations that GrubHub made at trial regarding Plaintiff's performance – in which it claimed that he "gamed the system" by showing up late for shifts and leaving early but still getting paid for entire shifts. GrubHub had never informed Plaintiff earlier of its reason for his termination (and thus never gave Plaintiff opportunity to explain himself or respond to the accusations), thus confirming that GrubHub used its own discretion in determining that termination was justified. The fact that GrubHub could – and did – terminate Plaintiff in its

GrubHub unilaterally determines the amount the drivers are paid, which is generally on an hourly basis. ER0798, 1290-1291, 1531-1533. Drivers are generally expected to sign up for shifts (called "blocks"), which are made available each week by GrubHub, based upon its predictions of how much work would be available during various times of the week; these shifts were often difficult for drivers to get (thus limiting the times they would be able to work to those shifts that were available. ER0791.[7] While on shift, GrubHub expects its drivers to accept all or most deliveries assigned to them (which it assumes they will, in deciding how many drivers to schedule, *see* ER0883-885, 1124-1125, 1462-1463, 1543-1577), and if they fall below a certain percentage of assignments, they would

---

own discretion based on its alleged concern that he was acting improperly only confirms its control over him as an employer.

[7] GrubHub managers chose how many blocks of time to release each week based on past customer demand and their knowledge of upcoming events that might affect customer demand; managers made these decisions based on their assumption that drivers would accept all, or nearly all, orders sent to them during their shifts. ER0882-885, 1107-11-8, 1239, 1433-1434.

GrubHub tried to claim that drivers were not required to sign up for shifts, but the evidence confirmed that, as a practical matter, drivers would not receive very many deliveries if they did not sign up for shifts (nor would they get paid the guaranteed hourly rate) and that the vast majority of drivers signed up for shifts. ER1086. Throughout his work for GrubHub, Plaintiff always signed up for shifts and was not even aware that drivers could work while not signed up for a shift. ER0009, 1713.

not receive the guaranteed hourly rate.[8] While on shift, drivers are expected to remain in the areas in which they are signed up to work. ER0675, 1426-1478, 1718-1735.

GrubHub employs "dispatchers" (who were later renamed "operation specialists") who monitor the delivery drivers' work, follow the progress of deliveries, assign or reassign deliveries to drivers (based on their assessment of which drivers will best be able to perform them), and keep in touch with the drivers regarding their deliveries. ER0853-854, 1126, 1310-1311. GrubHub also employs "customer care" staff who interact with customers, keep them informed regarding the progress of their deliveries, answer their questions and respond to their concerns, offer them discounts and credits when needed, and keep in touch with the dispatchers regarding the drivers' progress in delivering their food. ER1396-1397. GrubHub maintains statistics and other information on the drivers' performance (such as restaurant complaints), and keeps this information in the

---

[8] The drivers would not receive the guaranteed hourly rate (which was at first $15 per hour, but then reduced to $11 per hour in December 2015, ER0749-752, 0798, 1724), if they delivered less than 75% of the deliveries assigned to them, a percent that was later increased to 85%. ER0778, 0798, 0984-986, 1290-1291, 1531-1533. Evidence at trial showed that, due to technology issues that may occur in drivers receiving orders, as a practical matter, drivers had to accept all (or nearly all) orders sent to them in order to achieve these percentages. ER1384-1385, 1450, 1544-1556, 1726.

drivers' files, which GrubHub's dispatchers and driver care employees consult when interacting with them. ER1278-1290, 1399-1472, 1711.[9]

Thus, even though this Court need not even reach Prongs A and C, since it is evident that GrubHub cannot satisfy Prong B of the ABC test, GrubHub cannot show that Plaintiff was an independent contractor under *any* prong, and the District Court's decision must be reversed.

II. *DYNAMEX* APPLIES TO THIS CASE

Given how clear it is that Plaintiff was GrubHub's employee under *Dynamex*, Plaintiff expects that GrubHub will argue that *Dynamex* does not apply to this case. However, *Dynamex* clearly applies retroactively to this case. It also applies to all three Labor Code claims that Plaintiff alleged, including the expense reimbursement claim, which is covered by California Wage Order No. 9.

A. *Dynamex* Applies to This Case Retroactively

While GrubHub may try to contend that *Dynamex* does not apply retroactively to this case, there should be no question that *Dynamex* – a unanimous

---

[9] The evidence showed that information contained in drivers' files, such as their performance statistics, would be used in managers' decisions of whether a driver should get "priority scheduling" (which would increase their chance of working the hours they wanted to work for the following week); information in a driver's file would also be discussed by GrubHub managers in deciding whether a driver should be terminated. ER0690, 0877-878.

decision of the California Supreme Court – applies here retroactively. As the California Supreme Court has explained, "[t]he general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 978; *see also Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 509.[10] There is also no question that new California caselaw applies to cases still pending on appeal. *See People v. Guerra*, 37 Cal. 3d 385, 399 (1984).

Indeed, the first courts to apply *Dynamex* have agreed that it applies retroactively. *See Garcia v. Border Transportation Group, LLC et al.*, 2018 WL 5118546, *11 (Oct. 22, 2019) (applying *Dynamex* retroactively to Labor Code claims that are covered by the Wage Orders); *Johnson v. VCG-IS, LLC* Case No. 30-2015-00802813, Ruling on Motion in Limine (Super. Ct. Cal. July 18, 2018), ER0161-171.

---

[10] The Court has gone so far to say that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207, citing *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79; *United States v. Tavizon-Ruiz* (N.D. Cal. July 25, 2016) 196 F. Supp. 3d 1076, 1078 ("[D]ecisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant.").

GrubHub is expected to argue that applying *Dynamex* would violate its due process rights because it reasonably relied on *Borello*. However, only the California Supreme Court can limit this retroactive application. *See Barr v. ADandS, Inc.*, 57 Cal. App. 4th 1038, 1053 (1997). Here, the California Supreme Court rejected Dynamex's motion to modify the ruling so that it would apply prospectively only. *Dynamex*, 4 Cal. 5th 903, *reh'g denied* (June 20, 2018). The decision thus applies to the events underlying the long-pending *Dynamex* case itself, going years into the past and thus clearly applies to pre-*Dynamex* events in other cases as well.

In any event, GrubHub cannot credibly argue that it "relied" on *Borello* in deciding to classify drivers such as Plaintiff as independent contractors.[11] The question of whether its drivers were properly classified as an independent contractor under *Borello* was highly uncertain prior to the District Court's ruling -- and remains uncertain today (particularly given Plaintiff's ongoing appeal in this case). Thus, this is not a situation in which a party relied on a longstanding clear

---

[11] Although the California Supreme Court did not announce its adoption of the ABC test until it issued *Dynamex*, Plaintiff had noted for the District Court repeatedly throughout this case (in summary judgment briefing, again before trial, and again in his post-trial briefing) that *Borello* was but one of three ways to determine employee status under the California Supreme Court's decision in *Martinez*. ER0296, 1759-1760, 1823-1824.

statement of the law in choosing to engage in the practice it engaged in. GrubHub cannot claim that it took comfort under *Borello* ***knowing*** that it had properly classified its drivers as independent contractors[12] under that standard.[13]

B. *Dynamex* is Applicable to Plaintiff's Expense Reimbursement Claim as Well as His Minimum Wage and Overtime Claims

Plaintiff also expects GrubHub to argue that the *Dynamex* decision does not apply to his claim for expense reimbursement under Cal. Lab. Code § 2802.[14]

---

[12] The question of whether GrubHub drivers – as well as workers generally in the so-called "gig economy" – have been misclassified as independent contractors has been a major subject of debate and uncertainty since the beginning of this business model, just a few years ago. There has been no definitive legal determination that "gig economy" companies could take comfort that *Borello* allows them to classify their workers as independent contractors. Indeed, this case was the first case to even go to trial on the question of whether a "gig economy" worker was properly classified and, even if *Dynamex* had not supplanted *Borello* as the proper test, its result would still be uncertain, as shown by Plaintiff's appeal of the judgment.

[13] GrubHub is also expected to argue that, if *Dynamex* is held to apply to this case, due process requires that it be given right to present additional evidence in a new trial. However, there is no reason whatsoever for a new trial or for the parties to present additional evidence. The question of what a company's usual course of business is an obvious question, which is routinely decided as a legal matter on summary judgment. *See supra* n.1. Here, not only did the District Court decide on summary judgment that Plaintiff's work fell within GrubHub's usual course of business, ER1797, the District Court reaffirmed that finding after trial. ER0029-30. The facts were already fully developed at and the *Dynamex* factors overlap with three of the *Borello* factors, but just applied a different way.

[14] The *Dynamex* Court declined to address specifically whether the ABC test

However, the ABC test announced in *Dynamex* clearly applies to that claim, since the Court held that it applies to Labor Code Claims covered by the California Wage Orders. *See Dynamex*, 4 Cal. 5th at 956-57; *Garcia*, 2018 WL 5118546, *11. Indeed, Wage Order No. 9 requires that an employer provide its employees with any "tools or equipment" that "are necessary to the performance of a job" (with certain exceptions not applicable here). Wage Order No. 9-2001, ¶ 9 (B), Cal. Code Regs., tit. 8, §11090.[15] This requirement mirrors that of § 2802, which is to reimburse employees for their reasonable and necessary business expenses. Indeed, one California court has already concluded that the *Dynamex* ABC test applies to PAGA claims predicated on violations of the Labor Code that are covered by the Wage Orders, including a claim for expense reimbursement under § 2802. *See Johnson*, Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine,

---

would apply to an expense reimbursement claim under Labor Code § 2802 because that question was not briefed by the parties to the Court in that case. *See Dynamex*, 4 Cal. 5th at 916 n. 5.

[15] Plaintiff here is not seeking reimbursement for the *purchase or rental of his vehicle*, which the Appeals Court in *Dynamex* recognized may not be covered by the Wage Orders. *Dynamex Operations W., Inc. v. Superior Court*, 179 Cal. Rptr. 3d 69, 82 (Cal. App. Ct. 2014). Instead, Plaintiff is seeking reimbursement for *the use of his vehicle*, which is covered. *See Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 24 (2007) (recognizing that Wage Order No. 9 would allow employers to require their employees to provide their own vehicle, *so long as the "employer agree[s] to reimburse the employee for all the costs incurred by the employee in the operation of the equipment*.") (emphasis added).

*5 (recognizing that a claim for expense reimbursement under § 2802 is "rooted in the wage orders") ER0168.[16]

III. IF THIS COURT BELIEVES IT NEEDS TO ADDRESS IT, THE DISTRICT COURT ERRED IN HOLDING PLAINTIFF TO BE AN INDEPENDENT CONTRACTOR EVEN UNDER THE *BORELLO* COMMON LAW TEST

As described above, it is clear that the *Dynamex* ABC test applies to this case. However, in any event, if this Court decides it needs to address the District Court's ruling under *Borello*, the District Court erred in holding Plaintiff was an independent contractor under that standard. Even under *Borello*, Plaintiff should have been found to be an employee, since GrubHub clearly retained the right to control Plaintiff's work, and the secondary *Borello* factors also support a conclusion that Plaintiff was an employee.

---

[16] Because it held that he was properly classified as an independent contractor, the District Court did not address whether Plaintiff had proved violations of the specific Labor Code provisions he alleged. There can be no doubt that GrubHub violated § 2802 because it did not reimburse its drivers for use of their vehicles. ER0010-11. But because the District Court did not make specific factual findings on the amount of expense reimbursement to which Plaintiff would have been entitled – nor did the District Court address Plaintiff's evidence that he suffered overtime and minimum wage damages ER0034 – this Court should remand to the District Court to make findings regarding the specific damages to which Plaintiff is entitled, as well as PAGA penalties he seeks for all California GrubHub drivers.

Under *Borello*, the "'most significant consideration' is the putative employer's 'right to control work details'" which "need not extend to every possible detail of the work." *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (quoting *Borello*, 48 Cal. 3d at 350). In addition to the right of control, the *Borello* test also considers "a number of 'secondary' indicia", 48 Cal. 3d at 350. These secondary indicia "cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations." *Id.* at 351. No one *Borello* factor "is dispositive when analyzing employee/independent contractor status." *O'Connor*, 82 F. Supp. 3d at 1140.

A. GrubHub Retained All Necessary Control Over Plaintiff's Work

As explained previously, under *Borello*, the most important factor is whether GrubHub retained all necessary control over Plaintiff's performance. *See Borello*, 48 Cal. 3d at 350; *see also Linton v. Desoto Cab Company, Inc.*, 15 Cal. App. 5th 1208, 1222 (Cal. App. Ct. Oct. 5, 2017) (noting "[t]hat a degree of freedom is permitted to a worker, or is inherent in the nature of the work involved, does not automatically lead to the conclusion that a worker is an independent contractor").

i. GrubHub Retained the Right to Terminate Its Drivers, Including Plaintiff, Without Cause

The strongest indicator that an alleged employer has retained the right to

control, indicating the presence of an employment relationship, is the employer's right to terminate a worker at will. *See Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 532 (2014) ("the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."); *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 988 (9th Cir. 2014).

While the District Court paid lip service to this principle, ER0024-27, it did not take *Ayala*'s admonition to heart. Acknowledging that GrubHub's contract retained GrubHub's right to terminate Plaintiff at will, the District Court began by stating that this point "arguably most suggests GrubHub had a right to control Mr Lawson's work . . . ." ER0027. The District Court then went astray and contradicted itself, finding that although GrubHub undisputedly retained the right to terminate Plaintiff without cause, this right to terminate did not give GrubHub significant control over Plaintiff. Attempting to draw a distinction between this case and the FedEx drivers in *Estrada,* 154 Cal. App. 4th. at 12, the District Court noted that while FedEx drivers made a significant financial investment in their trucks and routes, Plaintiff did not, and therefore a threat of termination by GrubHub would not hold the same power over Plaintiff as it would a FedEx driver, since Plaintiff apparently had no need to protect "his investment and livelihood."

ER0025.[17] Because GrubHub did not set Plaintiff's exact schedule, and because Plaintiff did not have to purchase special equipment (aside from hot and cold insulation bags) to perform the job, the District Court found that "Grubhub's right to terminate at will is neutral in the right to control analysis." ER0026.

This line of reasoning contradicts the California Supreme Court's pronouncement in *Ayala*. Indeed, while the District Court disregarded GrubHub's right to terminate Plaintiff at will as neutral, *Ayala* describes this factor as being of "*inordinate* importance." *Ayala*, 59 Cal. 4th at 539 (italics added). The District Court erred in ignoring this crucial point. For example, in *Desoto Cab Company*, the California Court of Appeal faulted the trial court for its failure to accord proper weight to the putative employer's right to terminate without cause, despite the fact that "the tools used by plaintiff on a daily basis over the years he worked were always provided by defendant, including the cab and the tool to collect fares." 15 Cal. App. 5th at 1223. The District Court in this case assumed that a threat of termination does not hold much weight in a situation like Plaintiff's, but this

---

[17] In making this observation, the District Court failed to appreciate that making a significant financial investment in one's work actually supports a finding of independent contractor status under *Borello*, 48 Cal. 3d at 355. The District Court, however, ironically held that Plaintiff's lesser investment than the FedEx drivers – who were held to be employees in *Estrada* and *Alexander* – somehow supported a finding that he was an independent contractor.

assumption is supported neither by California case law nor by common sense. Whether or not a low wage worker has invested significantly in the tools to complete a job, the threat of losing a job means the possibility of not being able to make rent or put food on the table.

Moreover, not only did GrubHub retain the right to terminate Plaintiff, but it actually exercised that right by terminating him (and other drivers for such reasons as being unavailable to perform deliveries during their shifts, turning down too many orders, leaving their zones during shifts, communicating directly with customers, and others. ER0695-705, 0898 1278-1290. When GrubHub terminated Plaintiff, it gave only a vague explanation, so that it is still not clear what exactly the reason was for his termination (although GrubHub spent much of the trial trying to justify his termination). ER0679, 1579-1580. He was not given any advanced warning or a chance to explain his conduct. ER1579-1580. *See Desoto Cab Co.*, 15 Cal. App. 5th at 1222 ("Plaintiff was terminated based on an allegation that, it appears, was never fully investigated. Nor was he allowed to contest the allegations against him before he was terminated. This factor alone presents strong evidence of an employment relationship . . ."") (citing *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1298 (Cal. Ct. App. 1991) (additional citations omitted)).

ii. GrubHub Controlled Its Drivers' Work, Including Plaintiff's, in Numerous Other Ways as Well

Not only did GrubHub's contract give it the right to terminate its drivers at will, the evidence at trial showed that it also exercised control over its drivers' work (including Plaintiff) in many other ways. The evidence also showed that GrubHub closely monitors its drivers' work. From their computer monitors in Chicago, GrubHub's dispatchers and driver care specialists could see where each driver was physically located at any moment during their shift. ER0932-933, 1310-1311. They monitored whether drivers left their shift early and warned them not to do so. ER0670, 0688-689, 1528-1529. If a driver did not accept an order, they may log them out of the system. ER1445-1446. The evidence at trial showed that GrubHub monitored Plaintiff and his work, as it did generally for its drivers. ER 0684-687, 1714. Indeed, Plaintiff was contacted when GrubHub believed he had not logged on for his shift. ER 0684-687, 1714. He was also contacted when he logged off several minutes early. ER0671-677, 0688-689, 1528-1529. He was even contacted when he logged off briefly to take a bathroom break. ER1527-1528.

GrubHub maintained statistics on the drivers, including the time it took them to perform deliveries, the number of orders they performed, and their acceptance

rate. ER0877-0880, 1432-1444.[18] GrubHub kept this information in a file for each driver. ER1400. It also collected complaints from restaurants and customers about drivers and allowed restaurants to rate the drivers, and it kept this information in the drivers' file. ER1400. These files could be consulted when GrubHub was deciding whether to terminate a driver. ER1282-83.

GrubHub kept close tabs on drivers' "acceptance rates", which needed to be near perfect in order for drivers to receive the guaranteed hourly rate. ER0778, 985-986, 1465-1466.[19] Further, if drivers did not accept an order, they may be logged off their shift and would risk having the shift removed altogether. ER0686-687, 1454-1455. Low acceptance rates could also, in GrubHub's discretion, lead to a driver's termination. ER695-705.[20]

---

[18] This information would be used to decide if a driver should get priority scheduling, so that they would have a better chance of working the hours they wanted to work for the following week. ER0877-880.

[19] Essentially, by running the risk of slipping below the minimum acceptance rate (75%, which was raised to 85% during Plaintiff's employment with GrubHub), as a practical matter, drivers needed to accept every order possible so as to avoid being docked from their hourly wage. *See Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (noting that pay reductions "because of variations in the ... quantity of the work performed" is consistent with the pay structure of a non-exempt employee).

[20] Moreover, at the time that Plaintiff worked for GrubHub, drivers were not able to pick and choose which orders they wanted to accept, based for example on

The District Court focused heavily on the fact that Plaintiff supposedly controlled whether he worked and for how long, but ignored the evidence that GrubHub actually controlled when and how much its drivers (including Plaintiff) worked through its system of blocks. In order to work, drivers were expected to sign up for shifts (called "blocks"), which were made available each week by GrubHub, based upon its predictions of how much work would be available during various times of the week. ER0798.[21] Drivers could only get shifts if they were available, and because there were many drivers were competing to sign up for the shifts, they were hard to come by. ER691-693.[22] GrubHub used the block system to incentivize the drivers to maintain high performance metrics by awarding high performing drivers "priority scheduling" privileges that allowed them to sign up

---

the size of the order or location of the customer. ER1445-1478. At the time the cowbell rang on the app indicating that an order was coming through, the driver had a short window of time – as little as 10 to 20 seconds – to press "accept"; the only information available to them when they did so was the location of the restaurant. ER1145-1458.

[21] GrubHub managers chose how many blocks to release each week based on past customer demand, their knowledge of upcoming events that might affect customer demand, and based on their assumption that drivers would accept all, or nearly all, orders sent to them. ER1107-1108.

[22] Drivers could not work literally whenever they wanted. Shifts were, naturally, most available around peak mealtimes and based on managers' decisions as to how many drivers were needed and when. ER 1003.

for shifts before other drivers. ER0877-880.

Further evidence of GrubHub's control over its drivers is shown by the fact that GrubHub established the rate of pay and the system of paying drivers. ER0778.[23] Drivers could not and did not negotiate their rates, either with GrubHub or with customers. ER1567-1568.

GrubHub also exercised control over its drivers in that it expected its drivers to remain during their shifts in designated geographical areas referred to as "zones." ER1418. GrubHub would monitor whether drivers were in their zone at the start of their shift and if they left their zone during the shift. ER0675.[24]

GrubHub provided drivers with its bright red shirts and hats, containing

---

[23] The District Court did recognize that the pay system was evidence of GrubHub's control: "GrubHub did control some aspects of Mr. Lawson's work. GrubHub determined the rates Mr. Lawson would be paid and the fee customers would pay for delivery services. While the Agreement states that a driver may negotiate his own rate, this right is hypothetical rather than real. The Court finds that Mr. Lawson could not negotiate his pay in any meaningful way and therefore this fact weighs in favor of an employment relationship." ER0023.

[24] The District Court found that Plaintiff did not work under any boss or supervisor. ER0023. However, GrubHub specifically employed operations specialists to monitor drivers via GPS, who could reassign orders if the drivers took too long, could toggle drivers off of the GrubHub App, and could even recommend that drivers be terminated. ER0853-855. Likewise, GrubHub employed driver care specialists who addressed customer complaints regarding the drivers, assisted drivers when problems arise, monitored the drivers, and cancelled drivers' blocks when they rejected too many orders. ER1462-1464.

GrubHub's branded logo. ER0799. It also provided insulated food bags with its logo. ER0799.While these were not strictly "required", they were encouraged.[25] *See*, *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal. App. 4th 1046, at 1051(2006) (workers were employees even where they were not required to wear uniforms or badges). The evidence also clearly showed that GrubHub closely monitored its drivers' work and their availability to perform deliveries during their shifts. ER1413-1494 [26]

Ultimately, GrubHub may not dictate each and every detail of its drivers' work,[27] but the evidence showed that it monitors and dictates many of them, and it also exercised "absolute overall control of all meaningful aspects of this business

---

[25] Drivers were required to use an insulated bag. ER0799. GrubHub charged drivers for the use of its bag, but waived the fee if they agreed to wear the shirt and hat, which was a means of encouraging the drivers to wear the shirt and hat. (Cite Lawson 127-128, Smith at 153, Ex. 1 at GH000333.) ER0799.

[26] While GrubHub attempted to emphasize at trial the drivers' freedom (allowed by the contract) to work for other companies if they wished, GrubHub's Los Angeles General Manager Jeff Smith admitted that he would prefer for drivers to focus on their work for GrubHub and not be working for other companies. ER0936-942. The fact that a worker has juggled multiple jobs for multiple employers does not make him an independent contractor.

[27] The District Court found, for example, that Plaintiff "was not provided with a script for how to interact with restaurants or customers," ER0020, but in fact, he was provided with GrubHub training videos that instructed him on those issues. ER1705-1706.

relationship." *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101 (9th Cir. 2014). Moreover, "the simplicity of the work" made "detailed supervision, or control, unnecessary." *Air Couriers Int'l*, 150 Cal. App. 4th at 937; *see also JKH Enterprises*, 142 Cal. App. 4th at 1064; *Borello*, 48 Cal. 3d at 356-57 ("It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary . . . Under these circumstances, Borello retains all *necessary* control over the harvest portion of its operations.").

Accordingly, the primary *Borello* factor – control – should have weighed heavily in favor of a finding that Plaintiff was GrubHub's employee.

B. The Secondary *Borello* Factors Also Support a Conclusion that Plaintiff was GrubHub's Employee

In addition to the primary factor of control, the weight of the secondary *Borello* factors also support Plaintiff's contention that he was GrubHub's employee.

First, with respect to the first secondary factor, as explained *supra* in Section I.B, Plaintiff was not engaged in a "distinct occupation or business." *Alexander*, 765 F.3d at 989. As the District Court correctly found, Plaintiff "did not run a delivery business of which Grubhub was one simple client." ER0027.

The second *Borello* secondary factor is whether Plaintiff performed work under the principal's direction. *See Alexander*, 765 F.3d at 995. As the District

Court correctly noted, this factor overlaps with the right-to-control analysis. However, as the District Court incorrectly found in its right-to-control analysis that Plaintiff had no supervisor or boss, ER0023, it was also error for the District Court to find that Plaintiff's work was not performed under GrubHub's direction or supervision. As explained in Section III.A.iii *supra*, Plaintiff operated under the detailed oversight of GrubHub's dispatchers (later known as "operations specialists") and driver care specialists.

The second *Borello* secondary factor is whether Plaintiff performed work under the principal's direction. *See Alexander*, 765 F.3d at 995. As the District Court correctly noted, this factor overlaps with the right-to-control analysis. However, as the District Court incorrectly found in its right-to-control analysis that Plaintiff had no supervisor or boss, ER0023, it was also error for the District Court to find that Plaintiff's work was not performed under GrubHub's direction or supervision. As explained in Section III.A.iii *supra*, Plaintiff operated under the detailed oversight of GrubHub's dispatchers (later known as "operations specialists") and driver care specialists.[28]

---

[28] Those individuals knew when Plaintiff was or was not logged on for a shift, they monitored his location, and they would contact him if he was not where he was supposed to be. ER1416-1470. For example, GrubHub contacted Plaintiff and took him off his shift because he toggled unavailable for ten minutes to take a

The third factor, the skill required in the occupation, *see Alexander*, 765 F.3d at 995, obviously supports employee status here. As the District Court correctly found, "no special skills are needed" to perform the duties of a GrubHub delivery driver. ER0028.

Regarding the fourth secondary factor, which examines "whether the principal or worker provides the instrumentalities, tools, and place of work." *Estrada* 154 Cal. App. 4th at 9, when viewed in relation to GrubHub's enormous investment in the business, this factor likewise supports employee status. The evidence showed that GrubHub's Operation and Support expenses increased by more than $64 million from 2015 to 2016, which was attributable primarily to expenses related to GrubHub's delivery services. ER1143-1203. Moreover, GrubHub has invested tens of millions of dollars since 2015 to acquire other companies in order to grow its delivery business. ER1202-1203. GrubHub's investments obviously dwarf Plaintiff's. The District Court's finding that this factor supported independent contractor status was an error, because the District

---

bathroom break. ER1527. His performance statistics were noted and used to determine his schedule and pay. ER0690. He could be terminated for not accepting enough orders or not being available to take orders during his shift, and indeed he was apparently terminated for this very reason. ER0679. There was simply no evidentiary support for the conclusion that Plaintiff operated without supervision.

Court was wrong to consider this factor in a vacuum (especially after noting how much less Plaintiff invested in business than FedEx drivers, who were held to be employees in *Estrada* and *Alexander*). Courts in California and around the country consider the alleged employer's investment in their business as compared to the plaintiff's. *See, e.g.*, *Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 488 (N.D. Cal. 2017) (noting in spite of the fact that delivery drivers provided their own vehicles and hundreds of dollars of other equipment, "these investments were minimal when compared to the total capital investment necessary to operate [defendant's] business."); *Sakacsi v. Quicksilver Delivery System, Inc.*, 2007 WL 4218984 at *7 (M.D. Fla. Nov. 28, 2007) (holding relative investment weighed in favor of employee status where many courier drivers "used their own personal cars to make [] deliveries" and courier service's cost for purchasing and maintaining its software and system far outweighed the costs to drivers).

The fifth secondary *Borello* factor is "the length of time for performance of services." *Alexander*, 765 F.3d at 996. The factor also supports employee status, because GrubHub contract contemplated a permanent relationship with Plaintiff and automatically renewed every sixty days. ER0781. *See Flores*, 250 F. Supp. 3d at 491 ("The agreement suggests permanency in that it does not include a fixed employment period and automatically renews."); *Antelope Valley Press v. Poizner*, 162 Cal. App. 4th 839, at 855 (2008) ("[T]he notion that an independent contractor

is someone hired to achieve a specific result that is attainable within a finite period of time, such as plumbing work, tax service, or the creation of a work of art for a building's lobby is at odds with carriers who are engaged in prolonged service to [defendant]."). The District Court concluded that GrubHub "did not count on its relationship with its drivers being permanent." ER0028. However, if that were true, GrubHub's contract would not have been drafted to automatically renew every sixty days with no contemplated end. ER0781.

The sixth secondary factor, the method of payment, weighs heavily in favor employee status. *Estrada*, 154 Cal. App 4th at 8. As a practical matter, GrubHub paid its drivers, including Plaintiff, on an hourly basis, with a pay statement emailed to him and a direct deposit into his bank account each week. ER0788. As the District Court found, "Grubhub, in practice, paid Mr. Lawson as an hourly employee." ER0029.

Finally, the seventh secondary factor, whether Plaintiff's work was a part of GrubHub's regular business strongly supports employee status. *See Alexander*, 765 F.3d at 996. As explained *supra* in Section I.A, as a delivery driver, Plaintiff's work was manifestly at the core of GrubHub's business. To reiterate, the District Court recognized that "Grubhub . . . is in the business of online restaurant ordering and, in the Los Angeles market, of also providing food delivery for certain restaurants." ER0030. Therefore, "this factor favors an employment relationship."

ER0029.[29]

On balance, the primary factor of control, weighed with the secondary *Borello* factors, should have led the District Court to conclude that Plaintiff was an employee even under the common law *Borello* standard. GrubHub maintained the right terminate Plaintiff at will (and did in fact terminate him), a factor "inordinate importance." *See Ayala*, 59 Cal. 4th at 539. The District Court erred by wrongfully turning a blind eye to GrubHub's ability to terminate at will and by affording too much weight simply to Plaintiff's supposed ability to work whenever he wanted.

Even if this Court were to consider the *Borello* standard, the District Court's decision should be reversed.

IV. THE DISTRICT COURT ERRED BY GRANTING GRUBHUB'S PREMATURE MOTION TO DENY CLASS CERTIFICATION

At the outset of this case, and before Plaintiff even moved for class certification, the District Court granted GrubHub's premature motion to deny class certification. ER0035-44. The District Court decided that, because GrubHub's

---

[29] With respect to the eighth secondary factor, "the Parties' belief," the District Court found this factor to be neutral. ER0030-31. Plaintiff maintains that he believed he was an employee (notwithstanding the fact that he was required to sign a contract stating that he was an independent contractor), but emphasizes that this factor is not given significant weight by courts. "California law is clear that [t]he label placed by the parties on their relationship is not dispositive." *Alexander*, 765 F.3d at 989.

agreement with its drivers includes an arbitration agreement containing a class action waiver – which Plaintiff was one of the only drivers to opt out of – a class action could not proceed. ER0035-44. The District Court's approach, however, was incorrect and put the cart before the horse.

A. The District Court Should Have Permitted Plaintiff to Move for Class Certification, and if a Class Were Certified, it Could Have Then Considered GrubHub's Motion to Compel Class Members' Claims to Arbitration

As a number of courts across the country have recognized, when faced with a situation in which putative class members (but not the named plaintiff) may be subject to arbitration clauses, the proper course is for the District Court first to address class certification, and if it finds that a class is warranted under Fed. R. Civ. P. 23, then allow the defendant to move to compel arbitration against the class. Indeed, courts faced with early issues regarding whether putative class may ultimately be required to arbitrate have regularly deferred addressing arbitration issues until after class certification. *See, e.g.*, *Conde v. Open Door Marketing, LLC*, 223 F.Supp.3d 949, 969 (N.D. Cal. 2017).[30] Then, if the defendant believes it

---

[30] *See also In re Evanston Nw. Corp. Antitrust Litig.*, 2013 WL 6490152, *5 (N.D. Ill. Dec. 10, 2013) (granting class certification under Rule 23 notwithstanding the fact that some class members were bound by arbitration agreements); *Davis v. Four Seasons Hotel Ltd.*, 2011 WL 4590393, *4 (D. Haw. Sept. 30, 2011) (deferring arbitration issues until after class certification); *Coleman*

is warranted, it can move to compel the class to arbitration, and the court can then always narrow the class if it holds that class members' claims cannot proceed in court.[31]

Thus, the District Court proceeded improperly here by acting first on GrubHub's motion to dismiss class allegations. The Court should have permitted Plaintiff to move for class certification in due course (perhaps following some discovery), and then, if Plaintiff satisfied the requirements of Fed. R. Civ. P. 23, it should have certified the class. Then GrubHub could have moved to compel

---

v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 91 (M.D. Tenn. 2004) (same); *Bond v. Fleet Bank (RI), N.A.*, 2002 WL 31500393, *7 (D.R.I. Oct. 10, 2002) (same); *Collins v. Int'l Dairy Queen, Inc.*, 168 F.R.D. 668, 678 (M.D. Ga. 1996) (same); *see also Woods v. Club Cabaret, Inc.*, 140 F. Supp. 3d 775, 782-83 (C.D. Ill. 2015) (granting conditional certification under the FLSA notwithstanding the fact that some class members were bound to arbitrate and deferring consideration of arbitration agreements); *Deatrick v. Securitas Security Services USA, Inc.*, 2014 WL 5358723, *3 (N.D. Cal. Oct. 20, 2014); *D'Antuono v. C & G of Groton, Inc.*, 2011 WL 5878045, *3 (D. Conn. Nov. 23, 2011); *Sealy v. Keiser Sch., Inc.*, 2011 WL 7641238, *3-4 (S.D. Fla. Nov. 8, 2011); *Whittington v. Taco Bell of America, Inc.*, 2011 WL 1772401 (D. Col. May 10, 2011); *Davis v. Novastar Mortg., Inc.*, 408 F. Supp. 2d 811 (W.D. Mo. 2005); *Villatoro v. Kim Son Restaurant, L.P.*, 286 F.Supp.2d 807 (S.D. Tex. 2003).

[31] Courts have disfavored the process that the District Court allowed to occur here, where the defendant files an early "motion to strike class allegations" or "motion to deny class certification." *Kick v. Alibab.com, Inc.*, 2018 WL 4181955, *2 (N.D. Cla. Aug. 30, 2018) (citing *Amey v. Cinemark USA, Inc.*, 2014 WL 4417717, *3-4 (N.D. Cal. Sept. 5, 2014)). Under Rule 23, the proper course is to allow plaintiffs to move for class certification when they deem appropriate, not to allow defendants to defeat class certification right out of the gate.

arbitration of the class members' claims. Because Plaintiff himself was not bound by an arbitration provision, it was inappropriate for the Court to address arbitration before there was even a party before the Court who may have been bound by an arbitration clause.

B. Because Plaintiff Was Not Bound by an Arbitration Agreement, He Should Have Been Free to Attempt to Represent a Class of GrubHub Drivers in Court, Regardless of Whether They Would Have Been Bound by Arbitration Had They Brought Their Own Claims

It is undisputed that Plaintiff was not precluded from asserting his claims in court because he opted out of GrubHub's arbitration provision. ER0035. Thus, he should have been free to pursue a class claim in court. *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Circ. 2014) (where an employee sought to bring a class action in court, this Court affirmed order compelling her to arbitration, explaining that the plaintiff "had the right to opt out of the arbitration agreement, and had she done so she would be free to pursue this class action in court.").

Had Plaintiff been permitted to file his motion for class certification (at the appropriate time), he would have explained to the District Court that it should not be relevant whether the unnamed class members would have been permitted to bring their own claims in court (had they tried to do so) because, unlike Plaintiff,

unnamed class members are "not part of the lawsuit." *In re DirecTV Early Cancellation Litig.*, 738 F. Supp. 2d 1062, 1072 (C.D. Cal. 2010); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ("an absent class-action plaintiff is not required to do anything."); *Bzdawka v. Milkwaukee Cty.*, 238 F.R.D. 468, 473 (D. Wis. 2006) ("In a class action, the unnamed class members are 'passive' in contrast to the named plaintiff, who actively prosecutes the litigation on their behalf"), citing Conte & Newberg, supra, at § 2.7. Instead, under Rule 23, unnamed class members are *represented* by a class representative who asserts claims on *behalf of* unnamed class members. *See* Fed. R. Civ. P. 23; *Aguilera v. Prospect Mortgage, LLC*, 2013 WL 4779179, *4 (C.D. Cal. Sept. 5, 2013) ("In a Rule 23 class action, the class representatives are understood to represent all absent class members from the moment of certification.").[32]

---

[32] Further highlighting the passive role of unnamed class members, Rule 23 provides them with protection by requiring the class representative to meet certain criteria, including typicality of claims and adequacy of representation. *See* Fed. R. Civ. P. 23 (a)(3)-(4). Other examples showing that class members are not themselves parties to an action include the fact that unnamed class members are not required to have standing. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 364 (3d Cir. 2015) ("a class action is a *representative* action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction … Requiring individual standing of all class members would eviscerate the representative nature of the class action."). And unnamed class members are not normally subject to discovery. *See, e.g., On the House Syndication, Inc. v. Fed.*

Although GrubHub's arbitration agreement may well have prevented other drivers from proceeding with their claims in court (had they attempted to bring claims themselves in court), GrubHub's arbitration agreement notably does *not* prevent drivers from being passive class members in a class case brought by another driver on their behalf (a driver who is *not* bound to arbitrate).[33] GrubHub's arbitration agreement is notably different in that respect from that promulgated by other companies, which expressly forbid workers from, not only bringing their own

---

Exp. Corp., 203 F.R.D. 452, 455-456 (S.D. Cal. 2001) ("allowing wide-ranging discovery from absent class members would serve to undermine the very purpose of class action suits") citing *In re Worlds of Wonder Securities Litigation*, 1992 WL 330411, *2 (N.D. Cal. July 9, 1992) ("Absent class members are not parties and separate discovery of individual class members not representatives is normally not permitted.").

[33] "[I]t is the language of the contract that defines the scope of disputes subject to arbitration." *E.E.O.C. v. Waffle House,* 534 U.S. 279, 289 (2002) The language that GrubHub chose to use in its arbitration agreement does not, on its face, preclude unnamed class members from being passive class members in a case brought by someone else on their behalf. GrubHub's arbitration provision provides that drivers who are bound by it have agreed *only* that "The Parties . . . mutually agree that in connection with entering into this agreement to arbitrate, they waive their right to have any dispute or claim brought between or among them, heard or arbitrated as a class action . . . ." ER0738. Here, absent class members did not seek to "bring" claims, nor have their claims "heard." Only Plaintiff has affirmatively "brought" this claim and sought to have it "heard." Thus, in the case, Plaintiff would have his claims *heard*, and if he succeeded in bringing class claims, absent class members would be subject to a judgment on those claims. They did not agree in the arbitration agreement to *not* participate in, or passively benefit from, a class action brought on their behalf.

claims in court, but also from being passive class members in a class claim brought by someone else.[34]

The District Court incorrectly did not even consider this argument, as it prematurely granted GrubHub's motion to strike class allegations.[35]

---

[34] *See, e.g., Coleman v. Jenny Craig, Inc.*, 2013 WL 6500457, *4 (S.D. Cal. Nov. 27, 2013), *aff'd*, 2016 WL 1583627 (9th Cir. Apr. 20, 2016) (noting that arbitration provision that precluded unnamed class members from "participat[ing] in a class action" could prevent such individuals from being part of a certified class); *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 611 (S.D. Cal. 2015) (class waiver precluded employees from proceeding in court "as a plaintiff or class member"); *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 862 (D. Md. 2013) (finding that unnamed class members who had agreed to not "file *or join* any class action or class arbitration" were precluded being part of the certified class) (emphasis added); *Andrade v. P.F. Chang's China Bistro, Inc.*, 2013 WL 5472589, *12 (S.D. Cal. Aug. 9, 2013) (class waiver precluded class members from "*participat[ing] in* a class, representative or collective action") (emphasis added); *Ramirez v. Freescore, LLC*, 2011 WL 3812608, *3 (C.D. Cal. Aug. 30, 2011) (enforcing class waiver that waived the right of class members to "bring or participate in a class action or similar proceeding"). GrubHub, as a sophisticated business, could have used such broader language if it had intended its drivers not to be permitted to participate as passive class members in a class claim brought by someone not bound by the arbitration clause. But it did not. GrubHub, the drafter of the arbitration provision, should not be permitted to argue that unnamed class members have agreed to something that they did not. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. at 478 (1989).

[35] Indeed, this argument was addressed and adopted in the case of *Johnson v. Morton's Restaurant Group, Inc.*, AAA Case No. 11 160 01513 05, Class Determination Award (Partial Final Award), p. 15-16, ER1865-1884, where a class was certified, over the objection of the employer who argued that a class action waiver prevented employees who were bound by an arbitration clause from being

CONCLUSION

The District Court's decision that Plaintiff was an independent contractor rather than GrubHub's employee must be reversed. Under the California Supreme Court's landmark decision in *Dynamex*, Plaintiff was clearly GrubHub's employee, and that decision applies here and to all claims in this case.

Even if this Court were to consider the *Borello* test (which it should not), the District Court erred in its conclusion that Plaintiff was an independent contractor under that test.

Finally, this Court should reverse the District Court's decision to dismiss the class allegations here prematurely and should reserve addressing arbitration issues until after deciding whether class certification is appropriate.

---

certified as class members in the case. The arbitrator in that case noted that the arbitration provision precluded these unnamed class members from "initiating" class claims, but it did not forbid them from "participating in class claims legitimately initiated by other persons who are not so restricted." This decision was confirmed by the federal court in *Johnson v. Morton's Restaurant Group, Inc., et al.*, Case No. 07-11808-MLW (D. Mass. Nov. 25, 2008) (Dkt. No. 25).

Dated: November 9, 2018

Respectfully submitted,

RAEF LAWSON, individually and on behalf of other similarly situated individuals, and in his capacity as Private Attorney General Representative,

By his attorneys,

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan
Thomas Fowler
LICHTEN & LISS-RIORDAN, P.C.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations of Fed. R. App. P. 32(a) and Ninth Circuit Rule 32 because:

(1) Pursuant to Fed. R. App. P. 32, this Opening Brief contains 13,203 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32 because the brief has been prepared in 14-point Times New Roman, which is a proportionally spaced font that includes serifs.

Dated: November 9, 2018

/s/ Shannon Liss-Riordan

Shannon Liss-Riordan
Thomas Fowler
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
617-994-5800
sliss@llrlaw.com
tfowler@llrlaw.com

Attorneys for Plaintiff-Appellant Raef Lawson

STATEMENT REGARDING RELATED CASES

As far as the undersigned is aware, there are no related cases pending before this Court.

Dated: November 9, 2018

/s/ Shannon Liss-Riordan

Shannon Liss-Riordan
Thomas Fowler
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
617-994-5800
sliss@llrlaw.com
tfowler@llrlaw.com

Attorneys for Plaintiff-Appellant Raef Lawson

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: November 9, 2018

/s/ Shannon Liss-Riordan

Shannon Liss-Riordan
Thomas Fowler
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
617-994-5800
sliss@llrlaw.com
tfowler@llrlaw.com

Attorneys for Plaintiff-Appellant Raef Lawson